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Griffith v. United Airlines-The Demise of Lex Loci Delicti?

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NOTES

GRIFFITH v. UNITED AIRLINES—THE DEMISE OF LEX LOCI DELICTI?

Probably the most difficult problem in the area of conflict of laws is determining which local law shall govern the rights and liabilities of parties where the occurrence giving rise to these relations has substantial elements in two or more states with different local laws. The Pennsylvania Supreme Court, in the recent case of *Griffith v. United Airlines, Inc.*,[1] dealt with one aspect of this vexing problem in somewhat sweeping and dramatic fashion, overruling prior case law in Pennsylvania and introducing to the Commonwealth what appears to be a new legal and philosophical approach to this particular area of conflict of laws. This decision, one of definitive importance, will be examined in light of the judicial trend toward abandonment or modification of the traditional place of injury rule in multi-state tort actions.

Plaintiff's decedent, a Pennsylvania domiciliary, purchased a ticket from United Airlines at defendant's ticket office in Philadelphia for a flight from that city to Phoenix, Arizona and return. In the course of landing at a scheduled stop in Denver, Colorado, the plane crashed and decedent was instantly killed. His executor commenced an action in assumpsit against United,[2] a Delaware corporation doing business and maintaining facilities in both Pennsylvania and Colorado. The action was brought pursuant to the Pennsylvania Survival Act.[3] The lower court sustained the cause of action as having been brought under a valid contract of carriage and held that the law of Colorado, the place of injury, and not that of Pennsylvania, controlled on the matter of damages. Since Colorado permits only nominal recovery where death is instantaneous,[4] the plaintiff refused to amend and the action was dismissed.

1. 416 Pa. 1, 203 A.2d 796 (1964).

2. The action initially was against United and certain of its employees. The lower court, however, after sustaining the cause of action as having been brought under a valid contract of carriage, dismissed as to the individual defendants.

3. PA. STAT. ANN. tit. 20, § 320.603 (1950). The act does not specifically provide the measure of damages recoverable under it. In Skoda v. West Penn Power Co., 411 Pa. 323, 191 A.2d 822 (1963) the court held that recovery under the statute may be had for the present worth of decedent's likely earnings during his life expectancy, diminished by the amount he would have provided for the support of his wife and children and by the probable cost of his own maintenance. *Id.* at 335, 191 A.2d at 828-29. A federal district court, applying Pennsylvania law, came to the same conclusion in Delaware & Hudson R. R. Corp., 131 F. Supp. 95 (N.D. Pa. 1955).

4. The lex loci delicti provides as follows:

> All causes of action, except actions for slander or libel, shall survive and may be brought or continued notwithstanding the death of the person in favor of or against whom such action has accrued . . . and in tort actions based upon personal

On appeal the supreme court through Justice Roberts, reversed and remanded, agreeing that the plaintiff-executor could bring a valid action in assumpsit for defendant's alleged negligent breach of contract of carriage, but holding that in such action, under the particular facts presented, the law of Pennsylvania rather than Colorado governed the measure of damages recoverable.

Chief Justice Bell, in a vigorous dissent, disapproved of the majority's apparent abrogation of the traditional conflict of laws rule that in tort actions the substantive rights and liabilities of the parties are determined by the law of the state where the injury occurred—the lex loci delicti.[5] He strongly criticized the court for ignoring the principle of stare decisis, contending that the instant case does not present a situation falling under any of the recognized exceptions to that principle.[6]

The first step in approaching any conflict of laws problem normally involves a determination as to whether the issue presented is one of tort, contract or some other field.[7] This is necessary because, to a considerable extent, the solutions to problems in different areas are governed by different conflicts rules. Thus, the court here, as a preliminary matter, had to determine whether this survival action could properly be brought in assumpsit rather than trespass, and if so, which conflicts rules should be applied. After observing that there is no direct authority in Pennsylvania which would either permit or

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injury, the damages recoverable after the death of the person in whose favor such action has accrued, shall be limited to loss of earnings and expenses sustained or incurred prior to death, and shall not include damages for pain, suffering or disfigurement, nor prospective profits or earnings after date of death.

COLO. REV. STAT. ANN. § 152-1-9 (Supp. 1960).

5. This is generally stated to be that the substantive rights of the parties as well as the damages recoverable are governed by the law of the place of the wrong—the place where the injury occurred.

See generally GOODRICH, CONFLICT OF LAWS 260 (1949); HANCOCK, TORTS IN THE CONFLICT OF LAWS 30-26 (1942); LEFLAR, THE LAW OF CONFLICT OF LAWS 207 (1959); STUMBERG, PRINCIPLES OF CONFLICT OF LAWS, 1286-92 (2d ed. 1951). The rule evolved from the vested rights doctrine which is that the right to recover for a foreign tort derives from the law of the jurisdiction where the tort occurred. The doctrine was announced by Mr. Justice Holmes in Slater v. Mexican Nat'l Ry. Co., 194 U.S. 120 (1920). See generally BEALE, 2 CONFLICT OF LAWS 1286-92 (1935).

6. After reviewing the doctrine and analyzing its exceptions Chief Justice Bell summarized as follows:

> Up to the present time the well settled and directly applicable law of *lex loci delicti* has created no uncertainty or confusion in its language or in its application. Furthermore, there are *no new* circumstances, there is *no change* of circumstances, there are no irreconcilable decisions of this Court, the law of *lex loci delicti* has been consistently—not fluctuatingly— applied, there is no convincing reason or any justification for a change in the law of Pennsylvania, especially where the newly formulated rule creates, as we have seen, such obvious uncertainty, confusion and likely conflict of laws between the States.

416 Pa. at 33-34, 203 A.2d at 811.

7. See Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959), where the court determined that the question of interspousal immunity presented an issue of family law rather than tort law so that the law of the domicile rather than that of the place of wrong controlled.

prohibit an election to sue in trespass or assumpsit where a passenger is either injured or killed, the court held that the action could properly be brought in assumpsit.[8] It then however, for purposes of applying conflict of laws rules, proceeded to treat the case as though it has been brought in trespass on the theory that, looking at the realities of the situation, the recovery sought was a tort recovery and should thus be governed by principles of negligence rather than contract. Thus, for purposes of determining what conflicts rules to apply, the court treated the case as a tort rather than a contract action, thereby eliminating from consideration the conflicts rules applicable in the normal contract situation.[9]

The court then proceeded to the primary issue in the case, *i.e.*, whether Pennsylvania or Colorado law should control on the question of damages. The rule traditionally applied in multi-state tort cases is that the law of the place of injury controls the substantive rights of the parties.[10] For many years it has been well-settled in Pennsylvania that the existence of a cause of action in tort depends strictly upon the lex loci delicti, the place of wrong,[11] and no Pennsylvania case until *Griffith* has held otherwise. This undeviating adherence to the rule may be illustrated by reference to a few of the cases in which it was applied, and which have been overruled on this particular point by *Griffith*.

In *Bednarowicz v. Vetrone*,[12] the plaintiffs, residents of Pennsylvania, brought an action in trespass for the death of one guest passenger and injuries to another, resulting from an automobile accident in Ontario, Canada. Under

8. The court elaborated upon its decision on this point as follows:
> An easy answer is suggested in the argument that the Colorado limitation, by its own terms, is applicable only to tort actions. Since this is a contract action, the argument continues, we need not concern ourselves with the Colorado statute. . . . Counsel for plaintiff candidly admitted that this action was brought in assumpsit to avoid the effect of the Colorado limitation. Yet the recovery sought is clearly a tort recovery. . . . The principles which will govern defendant's liability are principles of negligence, not of contract, since the action is for negligent breach, not simple breach.

416 Pa. at 10-11, 203 A.2d at 800.

The rationale employed and the authorities cited by the court in deciding this preliminary issue will not be treated in detail in this Note.

9. The established rule is that the construction and validity of a contract are governed by the law of the place where it is made. See McLouth Steel Corp. v. Mesta Mach. Co., 214 F.2d 608 (1954); Evans v. Cleary, 125 Pa. 204, 17 Atl. 440 (1889). *Contra*, Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 199 (1963) where the Court of Appeals of New York abandoned this rule and adopted a "center of gravity" or "grouping of contacts" theory, emphasizing the law of the place having the most significant contacts with the matter in dispute.

10. RESTATEMENT, CONFLICT OF LAWS § 384 (1934). See generally LEFLAR, CONFLICT OF LAWS § 110 (1959).

11. See Vant v. Gish, 412 Pa. 359, 194 A.2d 522 (1963); Bednarowicz v. Vetrone, 400 Pa. 385, 162 A.2d 687 (1960); Rennekamp v. Blair, 375 Pa. 620, 101 A.2d 669 (1954); Rodney v. Stamen, 371 Pa. 1, 89 A.2d 313 (1952); Mike v. Lian, 322 Pa. 353, 185 Atl. 775 (1936), noted in 21 MINN. L. REV. 204 (1937).

12. 400 Pa. 385, 162 A.2d 687 (1960).

the law of Ontario a guest passenger has no right of action for damages resulting from the negligence of the host-driver of the automobile.[13] The court admitted that had the accident occurred in Pennsylvania the plaintiffs would have asserted a valid cause of action. The supreme court affirmed the judgment of the lower court which had applied the lex loci delicti rule and rendered judgment on the pleadings for the defendant. Justice Bell, author of the dissent in *Griffith*, noted that "this question of lex loci delicti or lex fori has been repeatedly ruled, adversely to plaintiff, by this court, which has held that lex loci delicti applies."[14]

Rennekamp v. Blair[15] was a wrongful death action against the owners of a private airplane. The guest passenger, a Pennsylvania resident on a flight from Pennsylvania to Virginia, was killed when the plane crashed in West Virginia. Under the law of West Virginia the damages recoverable in such action were limited to not more than $10,000. While the conflict of laws issue was not the central one in the case, the court left no doubt that had the plaintiff been able to prove negligence, his recovery would have been limited by this provision.[16] These cases and others demonstrate clearly Pennsylvania's adherence to a mechanical application of the lex loci delicti rule. While there appear to be no analogous cases under the survival statute, there is no reason to assume that in such case the approach, prior to *Griffith*, would have been any different from the cases just reviewed.

The lex loci delicti rule finds support among some legal writers who emphasize its ease of application and the element of certainty it provides in choice of law in the area of multi-state torts.[17] The rule as stated is inflexible, easily applied, and adds certainty and predictability to the law. On the other hand, its strict application has led to strange and perhaps even unjust results

13. REV. STAT. ONT. C. 167, § 50(2) (1950) provides that "the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in . . . the motor vehicle."

14. 400 Pa. at 388, 162 A.2d at 688 (citing cases). The chief argument against applying the Ontario statute was that the policy underlying it did not come into play in that type case. That policy, the prevention of collusive suits against the host's liability insurer, is not rationally applicable where the parties are Pennsylvania residents and suit is brought in Pennsylvania.

15. 375 Pa. 620, 101 A.2d 669 (1954). This case and others prior to it in Pennsylvania relied heavily on the original RESTATEMENT, CONFLICT OF LAWS § 378 (1934), which states categorically that "the law of the place of wrong determines whether a person has sustained a legal injury."

16. The court stated flatly that "the substantive rights of the parties are to be governed by the *lex loci delicti*—in this case the law of West Virginia . . . [which] limits the damages recoverable in such action to not more than $10,000." 375 Pa. at 621-22, 101 A.2d at 670.

17. Sparks, *Babcock v. Jackson—A Practicing Attorney's Reflections upon the Opinion and Its Implications*, 31 INS. COUNSEL J. 428 (1964). The author suggests that the law of the place of tort should govern except in cases where its application would involve discrimination in favor of one class over another.

in a few instances,[18] and for many years it has undergone severe criticism.[19] The attack centers around the point that the rule is simply too rigid to cope justly with modern complex multi-state tort problems, and the trend of thought among legal commentators is clearly in the direction of replacing or modifying it.[20] Where the result reached by strict application of the rule seems unjust it is usually in a situation where the only interest of the loci delicti in the outcome of the litigation derives from the fact that the injury fortuitously occurred there; yet, its local law, which allows little or no recovery, is applied in preference to the law of another state which has substantial contacts with the occurrence, and whose local law, if applied, would allow a substantial or significantly greater recovery.[21]

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18. An extreme example of such apparent injustice noted by the court in *Griffith* is the famous case of Carter v. Tillery, 257 S.W.2d 465 (Civ. App. Tex. 1953). This was a personal injury action arising out of an airplane crash in Mexico where the plane had strayed on a flight from New Mexico to Texas. The Texas court held that the law of Mexico applied but that since Mexican law was so dissimilar to Texas law the court lacked jurisdiction over the subject matter. Since all the parties were residents of Texas, suit apparently could not be brought in Mexico. Thus, the plaintiff was left without a remedy and the defendant was permitted to escape liability completely. See STUMBERG, CONFLICT OF LAWS 210-211 (3d ed. 1963); Stumberg, *The Place of the Wrong—Torts and the Conflict of Laws*, 34 WASH. L. REV. 388, 399 (1959). The author criticizes the result in *Carter* in light of other cases where the courts, under much less bizarre factual situations, avoided the application of the *lex loci delicti* rule.

19. See RESTATEMENT (SECOND), CONFLICT OF LAWS, Introductory Note No. 1 (Tent. Draft No. 9, 1964) (Approved May 21, 1964), STUMBERG, CONFLICT OF LAWS 199-212 (3d ed. 1963); Cavers, *A Critique of the Choice-of-Law Problems*, 47 HARV. L. REV. 173 (1933); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963); Ehrenzweig, *The "Most Significant Relationship" in the Conflict Law of Torts*, 28 LAW & CONTEMP. PROB. 700 (1963); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951); Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1251 (1963); Traynor, *Is this Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959). The list of articles criticizing the rule is virtually endless. In addition to those already noted the court suggests the authorities cited in 46 CORNELL L.Q. 637, 640 n.20 (1961) and 62 MICH. L. REV. 1358 n.3 (1964).

20. As to what this replacement should be, however, there is considerable disagreement. One writer suggests that the law of the forum should apply in all instances where the forum has a legitimate interest. Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963). Another suggestion is that the law of the forum should be applied if the forum has sufficient contacts with the occurrence or with the parties, and that where the forum lacks such contacts, it should select from a jurisdiction which does, the rule most like that of the forum. Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215 (1964). A third possibility, and one that seems to be finding increasing support, is that the rights and liabilities of the parties should be governed by the local law of the state which has the most significant relationship with the occurrence and the parties, and that separate rules should apply to different torts. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (1964). For criticism of the new Restatement see Ehrenzweig, *The "Most Significant Relationship" in the Conflict Law of Torts*, 28 LAW & CONTEMP. PROB. 700 (1963).

21. The *Griffith* case falls very nicely into this typical category. All the contacts

Where such an anomalous result would obtain through blind application of the general rule, some courts have sought ways to circumvent or avoid it.[22] One result of this approach is that a limitation has been placed on the rule in cases where its application would violate a strong public policy of the forum state.[23] One of the most striking illustrations of the application of this exception is the recent controversial case of *Kilberg v. Northeast Airlines, Inc.*,[24] where the New York Court of Appeals sidestepped the general rule that the law of the place where the wrongful act occurs governs the extent as well as the existence of liability.[25] In a suit arising out of an airplane crash in Massachusetts, resulting in the death of a New York resident, the court expressly grounded its refusal to follow the Massachusetts limitation on wrongful death recovery on the strong public policy of New York, expressed in its constitution[26] against statutory limitations on the amount recoverable in a wrongful death action. The court went further and determined that the question of damages, in view of the strong public policy involved, should be treated as one of procedure to be governed by the law of the forum. This view,

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were in Pennsylvania except for the purely fortuitous fact that the injury occurred in Colorado. Colorado had virtually no interest in the amount of damages recoverable, and it cannot be seriously argued that the defendant acted in reliance on the law of that state. It has been pointed out that the reliance argument is extremely weak where the tort is unintentional. Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 220, 227 (1963).

22. See the cases discussed and analyzed in Comment, 62 MICH. L. REV. 1358 (1964).

23. The public policy exception is recognized in the RESTATEMENT, CONFLICT OF LAWS § 612 (1934), which states that "no action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."

24. 9 N.Y.2d 34, 172 N.E.2d 526 (1961). The court of appeals affirmed the prior dismissal of the contract action by the appellate division which had reversed the supreme court, special term. Three judges concurring, objected to the court's consideration of the wrongful death action which was not technically before it. The only point actually before the court was whether the action could be brought in contract. It is to be noted that the decision in *Griffith* on this point is contra.

Notes on this case are to be found in numerous law reviews including 49 CALIF. L. REV. 187 (1961); 61 COLUM. L. REV. 1497 (1961); 46 CORNELL L.Q. 637 (1961); 74 HARV. L. REV. 1652 (1961); 28 U. CHI. L. REV. 733 (1961); 47 VA. L. REV. 692 (1961).

25. This rule was laid down by the United States Supreme Court in Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904). Mr. Justice Holmes, writing for the majority, stated: "that law [the law of the place of the act] determines not merely the existence of the obligation . . . but equally determines its extent." *Id.* at 126. The Pennsylvania Supreme Court, in Rodney v. Stamen, 371 Pa. 1, 89 A.2d 313 (1952), recognized that the amount recoverable under a foreign death statute is a substantive matter to be determined by the law of the place of wrong. In support of this rule see authorities collected in 47 VA. L. REV. 692 n.3 (1961).

26. N.Y. CONST. art. I, § 16 (1938) states that "the right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

A similar provision prohibiting limitations on recovery is to be found in the constitution of Pennsylvania. The constitution was amended in 1915 to provide an exception in the case of workmen's legislation. PA. CONST. art. III, § 21 (1873).

however, is followed in only two jurisdictions,[27] having been repudiated in two other jurisdictions which had apparently followed it for a time.[28] The reasoning in *Kilberg* on this point has frequently been criticized and is at least somewhat dubious in the light of existing authority.[29]

In *Pearson v. Northeast Airlines, Inc.*,[30] a case arising out of the same air disaster as *Kilberg*, the United States Court of Appeals for the Second Circuit, sitting en banc, stated that the *Kilberg* court's refusal to recognize the Massachusetts limitation on recovery provision was a valid exercise of the state's power to develop conflict of laws doctrine and was not violative of the full faith and credit clause of the Constitution.[31] Thus, the New York court applied the lex loci delicti rule by recognizing the Massachusetts law but was permitted to apply its own law to one particular issue of the litigation, despite the fact that "this would remove a defense provided by an 'integral' provision of the locus' statute creating the cause of action."[32]

Justice Roberts, writing for the majority in *Griffith*, suggests cases in other jurisdictions where courts have sought to avoid or change the lex loci delicti rule.[33] One of the leading cases is *Haumschild v. Continental Cas. Co.*,[34] where it was held that the law of the state of domicile governs the

27. See Armbuster v. Chicago, R.I. & Pac. Ry., 166 Iowa 155, 147 N.W. 337 (1914); Rochester v. Wells Fargo & Co., Express, 87 Kan. 164, 123 Pac. 729 (1912). These are apparently the last rulings in these two jurisdictions on the particular question.

28. See Jackson v. Anthony, 282 Mass. 540, 185 N.E. 389 (1933); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

29. Massachusetts had apparently adopted the minority rule in Higgins v. Central New England & W. R.R., 155 Mass. 176, 29 N.E. 534 (1892). The court in *Kilberg* relied on Wooden v. Western N.Y. & Pa. R.R., 126 N.Y. 10, 26 N.E. 1050 (1891) which while not expressly overruled, was considerably weakened by Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918). All of the above cases are discussed in 47 VA. L. REV. 692, 694 (1961). A subsequent decision by the New York Court of Appeals repudiated the substantive-procedural distinction employed in *Kilberg* and interpreted the decision as being based solely upon the strong public policy of New York. See Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902 (1962).

30. 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963). A three judge panel of the court first held that full faith and credit to the Massachusetts death act prevents a federal court sitting in New York from following the *Kilberg* dictum. Pearson v. Northeast Airlines, 307 F.2d 131 (2d Cir. 1962).

Then, however, the court, sitting en banc, rejected (six to three) both due process and full faith and credit objections to New York's refusal to apply the Massachusetts damage limitation. 309 F.2d at 557. The court indicated by way of dictum that an action for the death of a passenger in an airplane crash in Massachusetts on a flight from New York to Massachusetts could have been brought under the New York rather than the Massachusetts wrongful death act, because of New York's contacts with the transaction. 309 F.2d at 557.

31. See note 30 *supra*.

32. 309 F.2d at 562.

33. In addition to those discussed here by way of illustration the court cites George v. Douglas Aircraft Co., 332 F.2d 73 (2d Cir. 1964); Lowe's North Wilkesboro Hardware, Inc. v. Federal Mut. Life Ins. Co., 319 F.2d 469 (4th Cir. 1963); Gordon v. Parker, 83 F. Supp. 40 (D. Mass. 1949).

34. 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

capacity of one spouse to sue the other in tort, the rationale being that interspousal immunity is a question of family law rather than tort law.[35] Although the court avoided the rule in this case, it was careful to define the limits of its decision:

> Perhaps a word of caution should be sounded to the effect that the instant decision should not be interpreted as a rejection by this court of the general rule that ordinarily the substantive rights of the parties to an action in tort are to be determined in light of the law of the place of wrong. This decision merely holds that incapacity to sue because of marital status presents a question of family law rather than tort law.[36]

In *Grant v. McAuliffe*,[37] the law of Arizona, the place of injury, did not permit a tort action to be brought after the death of the tortfeasor. The Supreme Court of California concluded that the survival of a cause of action is a matter of the administration of decedents' estates rather than a tort problem, and in addition, that it is a procedural question to be governed by the law of the forum.[38]

The two cases discussed above clearly exemplify two basic approaches, in addition to the public policy exception employed in *Kilberg*, utilized by the courts to avoid application of the lex loci delicti rule. The first classifies the issue as something other than tort, while the second finds that the question involved is one of procedure to be governed by the law of the forum rather than the place of injury. Neither *Haumschild* nor *Grant* can be cited as authority for a complete rejection of the lex loci delicti rule. Both decisions seem rather to be motivated by a desire on the part of the courts to reach a preferred result without putting in question the utility of the traditional rule.

The rule was subjected to a more direct attack in *Schmidt v. Driscoll*

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35. The court here sought to achieve a desirable result by changing the label of the action from "tort" to "family law." Many commentators have encouraged this approach of reaching desirable results by manipulating labels. See Cook, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 346 (1942); STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 206 (2d ed. 1951); Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws—Law and Reason Versus the Restatement*, 15 U. PITT. L. REV. 397, 400 (1954); Kelso, *Automobile Accidents and Indiana Conflict of Laws: Current Dilemmas*, 33 IND. L.J. 297, 308 (1958). For criticism of this approach as being arbitrary and unconvincing see Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 218-19 (1963).

36. 7 Wis. 2d at 138, 95 N.W.2d at 819.

37. 41 Cal. 2d 859, 264 P.2d 944 (1953).

38. Judge Traynor, who wrote for the majority, later commented upon his opinion:

> It may not be amiss to add that although the opinion in the case is my own, I do not regard it as ideally articulated, developed as it had to be against the brooding background of a petrified forest. Yet I would make no more apology for it than that in reaching a rational result it was less deft than it might have been to quit itself of the familiar speech of the choice of law.

Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 670 n.35 (1959).

Hotel, Inc.[39] There the Minnesota court refused to apply Wisconsin law where Wisconsin's only contact with the occurrence was that the tort occurred there. Both parties were Minnesota residents. The defendant had violated the Minnesota dram-shop act by selling liquor to an intoxicated Minnesota resident who drove into Wisconsin and injured the plaintiff. It is difficult to fit the court's failure to apply Wisconsin law into any of the normal exceptions to the rule. The issue was clearly not procedural, there was no attempt to manipulate labels, and nowhere in the opinion is there an effort to justify the decision on public policy grounds. The conclusion appears to be the rather broad one that the court simply will not apply the rule "in fact situations such as the present to bring about the result described and where a determination to the opposite effect would be more in conformity with the principles of equity and justice."[40]

In each of the above cases it can be seen that a strict application of the lex loci delicti has been avoided where the place of injury had no direct interest in the resolution of the particular issues involved and instead the law of some other jurisdiction having a substantial interest in the occurrence has been applied. At the same time, the courts in most cases have either expressly or by implication acknowledged the rule, merely avoiding its application in particular fact situations.

This line of cases finally culminated in the extremely significant and now historic decision of *Babcock v. Jackson*.[41] The court applied New York law in an action for injuries sustained in Ontario, Canada by a New York guest as a result of the negligent operation of an automobile by his New York host. Here for the first time was an unqualified repudiation of the lex loci delicti rule. The Court of Appeals of New York discarded the rule because of its failure to recognize "the interest which jurisdictions other than that where the tort occurred have in the resolution of particular issues."[42] Citing *Kilberg*, the court noted that "realization of the unjust and anomalous results that may ensue from application of the traditional rule in tort cases has . . . prompted judicial search for a more satisfactory alternative in that

39. 249 Minn. 376, 82 N.W.2d 365 (1957).

40. *Id.* at 381, 82 N.W.2d at 368. The court observed that to apply the strict *lex loci delicti* rule would result in defeating the interest of Minnesota in punishing those who violate its liquor laws and in providing an injured party with a remedy, as well as the interest of Wisconsin in affording remedies for injuries in Wisconsin, resulting from out of state liquor violations.

41. 12 N.Y.2d 473, 191 N.E.2d 279 (1963). The facts here were virtually the same as in Bednarowicz v. Vetrone, 400 Pa. 385, 162 A.2d 687 (1960), in which the Pennsylvania Supreme Court applied the law of Ontario and dismissed the action. See text accompanying notes 12-14 *supra*.

Some notes on the case may be found in 62 MICH. L. REV. 1358 (1964); 77 HARV. L. REV. 355 (1963); 49 VA. L. REV. 1362 (1963).

42. 12 N.Y.2d at 478, 191 N.E.2d at 281.

area."[43] Emphasizing the fact that Ontario had only a minimal interest in the litigation while the interest of New York was clearly more substantial, the court went on to state that "there is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction."[44] This rationale led the court to the conclusion that the decision on any issue in a tort action is to be determined in accordance with the "law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented."[45] Thus, the new approach announced in *Babcock* not only looks beyond the single inquiry of where the injury took place, but opens up the possibility that the laws of more than one jurisdiction may govern the various issues in a multi-state tort action.[46] So, where the question is whether the defendant was exercising due care in the operation of his automobile, the jurisdiction where the wrongful conduct occurred will normally have the dominant interest, even if all the parties are residents of the forum state. On the issue of damages, however, the forum might have the more direct concern in having its law applied.

The position of the Restatement on choice of law problems in multi-state tort actions has recently been revised and is referred to both in *Babcock* and *Griffith* as lending support to those decisions. Thus, it is now provided that "the local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort."[47] The Restatement test differs from the approach employed in *Babcock* in that it looks to one jurisdiction whose law will govern the entire controversy while in *Babcock* the law of the state with the most significant contacts in regard to each issue is looked to, so that the law of more than one state may

43. 12 N.Y.2d at 479, 191 N.E.2d at 282.

44. 12 N.Y.2d at 484, 191 N.E.2d at 284.

45. *Ibid.*

46. See discussion on this point in Note, 62 MICH. L. REV. 1358 (1964).

47. RESTATEMENT (SECOND), CONFLICT OF LAWS, § 279 (Tent. Draft No. 8, 1963). It is suggested here that the important contacts for the forum to consider in determining the state with the most significant relationship include the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, nationality, place of incorporation, and place of business of the parties, and the place where the relationship, if any, between the parties is created. Factors to be consisdered in weighing the relative importance of the contacts are the issues, the character of the tort, and the relevant purposes of the tort rules involved. Rules are then set forth for the application of this section to specific torts.

However, the effect of this change in the new Restatement seems to be watered down somewhat by § 379(a) which provides:

> In an action for personal injury, the local law of the State where the injury occurred determines the rights and liabilities of the parties, unless some other state has a more significant relationship with the occurrence and the parties as to the particular issue involved, in which event the local law of the latter state will govern.

This latter provision seems to show a reluctance to completely abrogate the old rule and has been criticized in this respect. See Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963).

be applied to the resolution of a particular case. Unfortunately, the *Griffith* court does not make clear which approach it is adopting for Pennsylvania, though some of the language does suggest an adoption of the *Babcock* rule; particularly is this true where the court concluded that "the strict lex loci delicti rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of the policies and interests underlying the *particular issue* before the court."[48] The court indicates that its evaluation of the policies underlying the "significant relationships" to the controversy will be a qualitative rather than a quantitative one.[49]

In extolling the merits of the new rule the court brushes aside rather lightly the suggestion that any difficult problems might be encountered in its application: "It must be emphasized that this approach to choice of law will not be chaotic or anti-rational."[50] Yet, the court concedes that the new replacement for the traditional rule has not reached a stage of complete formulation: "We are at the beginning of the development of a workable, fair and flexible approach to choice of law which will become more certain as it is tested and further refined when applied to specific cases before our courts."[51] Here is an implicit admission that the new rule is as yet unrefined and its application to varied fact situations uncertain.

Ideally of course, choice of law rules should be simple and easy to apply, but carried to its conclusion, the result of pursuing such a goal is either lex loci delicti or lex fori. Because it is inconceivable that a single hard and fast rule could satisfactorily resolve all multi-state tort issues in the many areas of tort law, that rule must either be abandoned in favor of another, or modified in such a way as to permit the courts to attain substantial justice in all cases where the rule must be used. The limitations engrafted on the strict lex loci delicti rule have been the result of its failure to obtain substantial justice in all cases. However, any long established rule, even an imperfect one, should not be abandoned unless it is reasonably clear that its replacement is adequate to correct the old deficiencies and unless there are some set standards to guide the court in its application. There should be convincing evidence that

48. 416 Pa. at 21, 203 A.2d at 805. (Emphasis added.)

49. It appears that what the court means here is that it will concern itself with *evaluating* the various contacts involved rather than merely applying the law of the state which has the greatest *number* of contacts. Thus, there is a recognition that one particular contact may give a state more interest in the occurrence than another state with several contacts of lesser significance. Several commentators have voiced concern that the "significant relationship" test may become merely a contact-counting theory ignoring the underlying policy considerations. See Leflar, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1247-1248 (1963; Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 244 (1963); Comment, 51 CALIF. L. REV. 762 (1963).

50. 416 Pa. 22, 203 A.2d at 806.

51. *Ibid.*

some other rule would work better. To the extent that the application of the new approach is uncertain and its limits undefined, any attempt to do away with the old rule should be undertaken with extreme caution.

Perhaps in most cases where both the act and the injury occur in the same jurisdiction the law of that state will still be applied since it will be found to have the dominant contacts with the occurrence and with the parties. The court would simply reach that result on a policy and interest weighing rationale rather than upon the dictate of a mechanical rule. At the same time, the court will be faced with very real problems in future cases where two or more states have significant contacts with the occurrence. In these cases a choice will still have to be made as to which law to apply and determining which contacts are more significant than others will be no easy task. The courts will often have to examine the policies underlying each jurisdiction's interest in the controversy in order to resolve which contacts are the more qualitatively significant. This will be a tremendous task for the court, in whose discretion choice of law will rest in complex cases where more than one state has significant contacts and where this may be further complicated by conflicting policy considerations.

In resolving these difficult cases the courts should possess at a mimimum some definite guidelines to assist them in weighing the policies involved. *Griffith* gives the courts very little assistance in this regard. A standard which the majority defends as "no less clear than the concepts of 'reasonableness' or 'due process' which courts have evolved over the years"[52] should be viewed with some suspicion in light of the volume of litigation that these two concepts have produced. One might well ask whether the courts should subject themselves to the confusion, instability and increased litigation which, it is submitted, will result from the instant decision, at least until the new rule is more precisely defined. Add to this the argument that the new rule encourages forum shopping and discrimination by one state in favor of its own residents—granting recovery for recovery sake[53]—and it becomes much less clear whether the new rule can satisfactorily cope with the deficiencies of the old.

The chief criticism of the lex loci delicti rule appears to be the strange and sometimes unjust decisions which result from its strict application. The question is whether this problem will be remedied under the new approach. *Griffith*, like *Babcock*, was an ideal case in which to find an exception to the application of the traditional rule. The residence of plaintiff's decedent, the

52. *Ibid.*

53. These criticisms are discussed and illustrated in Sparks, *Babcock v. Jackson—A Practicing Attorney's Reflections upon the Opinion and Its Implications*, 31 INS. COUNSEL J. 428 (1964).

place where the ticket was purchased, and the origin of the trip were all in Pennsylvania. Colorado, like Ontario in *Babcock*, had no interest in the occurrence except for the adventitious fact that the injury occurred there. Suppose, however, that the ticket had been purchased in New Jersey and the flight had originated there. Would Pennsylvania still apply its own law on the issue of damages? If so, this would seem to make residency the factor of prime importance since all the other contacts would be in other jurisdictions. Suppose a resident of another state, which allowed only limited recovery under the particular facts, were suing United in Pennsylvania. Would Pennsylvania apply its own law, the law of the state of plaintiff's residence, or the law of the place of injury? To apply Pennsylvania law to its own resident, thereby granting him unlimited recovery, while at the same time denying full recovery to a non-resident under the law of another jurisdiction, where both parties were injured in the same occurrence, seems to degenerate the rule into one of confusion, injustice, and discrimination by one state in favor of its own residents. Thus, it is submitted that anomalous and unjust results will not be avoided under the new policy oriented approach.[54]

To the extent of the criticisms noted above, it is submitted that the decision in *Griffith* is a bit less heartening than it is historic. Rather than retaining the traditional rule and finding exceptions in proper cases, the court has apparently discarded that rule altogether. It can only be hoped that the courts, in electing to meet the challenge of balancing the competing interests of all the states concerned in each multi-state tort case, will be able to formulate and refine the standards to be employed toward this end, and thus avoid the confusion and uncertainty surely to result otherwise.[55] In view of the problems foreseeable under the policy oriented approach announced in *Griffith*, it might be desirable to interpret the decision narrowly as standing merely for the proposition that the lex loci delicti will not necessarily apply *strictly* in *every* case, but that the law of the place of the tort will still be followed except in those few situations where another jurisdiction clearly has a more dominant interest in having its law applied to the issues. Such a rule would have the advantage of providing the court with a standard

54. For a fact situation illustrating the nightmare a court might experience in trying to solve a complex case under the new approach, see the hypothetical posed by Chief Justice Bell in his dissenting opinion in *Griffith*. 416 Pa. at 29-30, 203 A.2d at 809.

55. In Berner v. British Commonwealth Pac. Airlines, Ltd., 230 F. Supp. 240 (S.D.N.Y. 1964), a federal court purporting to apply New York law, determined that whether plaintiffs were entitled to prejudgment interest in a wrongful death action depended on the law of the place of the tort. In the course of discussing the opinion in *Babcock* the court stated: "Since a mist of uncertainty now obscures an area which was formerly clear, it seems best to follow the old guideposts until new ones are erected . . . ." *Id.* at 246. The court was unable to actually apply the *Babcock* rule since it had no standards to determine whether the forum or the place of injury had the most significant contacts on the issue of prejudgment interest.

to guide its decisions in the vast majority of cases while at the same time giving it a degree of flexibility in which to develop more refined criteria for determining what law should apply in those difficult cases which fit uncomfortably into the pattern of the traditional rule.

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